A **PACIFIC & ORIENT INSURANCE CO BHD**

v.

MUNIAMMAH MUNIANDY

B COURT OF APPEAL, PUTRAJAYA
RAMLY ALI JCA
KANG HWEE GEE JCA
JEFFREY TAN JCA
[CIVIL APPEAL NO: W-02-NCC-1893-2010]
C 24 SEPTEMBER 2010

CIVIL PROCEDURE: *Judgments and orders - Enforcement of - Winding up petition - Whether Rules of the High Court 1980, O. 45 takes away right of judgment creditor to enforce judgment by way of a winding-*
D *up petition under Companies Act 1965*

COMPANY LAW: *Winding up - Application to injunct presentation of winding-up petition - Principles for granting of Fortuna Injunction - Whether winding-up application an abuse of process - Whether irreparable harm will be caused - Whether injunction to be granted - Companies Act*
E *1965, s. 218*

COMPANY LAW: *Winding up - Insolvency - Whether company commercially solvent - Failure by company to comply with notice under s. 218, Companies Act 1965 - Rebuttable presumption of insolvency - Onus*
F *on company to rebut presumption - Whether payment of debt claimed under s. 218 notice after expiry of stipulated three weeks period sufficient to rebut presumption*

COMPANY LAW: *Winding up - Petition - Whether company unable to*
G *pay debts - Whether a judgment under s. 96(1) Road Transport Act 1987 constitutes a debt for winding up purposes - Whether filing of appeal against judgment renders it a disputed debt - Companies Act 1965, s. 218*

INSURANCE: *Motor insurance - Liability - Insurer's statutory liability*
H *to satisfy judgment obtained by third party against insured - Enforcement of judgment against insurer - Whether third party must first file recovery proceedings against insurer before enforcing judgment against insurer - Whether judgment may be enforced against insurer by way of winding up proceedings under Companies Act 1965 - Road Transport Act 1987, s. 96*

I The appellant ('insurance company'/'insurer') was the insurer of the motorcycle KN 6162 ridden by one M. Sekar ('insured') which was involved in a road accident with the respondent. The respondent

filed an action against the said M Sekar and obtained judgment on 16 December 2009 wherein the court ordered M Sekar to pay the respondent RM89,374.03 in damages ('the said judgment'). The appellant obtained leave to appeal to the Court of Appeal against the said judgment. The appellant's application for stay of execution was dismissed by the High Court and the appellant's application for stay of execution at the Court of Appeal was still pending. The appellant did not make payment to the respondent on the said judgment. The respondent's solicitors served a notice under s. 218(1)(e) of the Companies Act 1965 ('CA65') on the appellant ('the s. 218 notice') on 25 March 2010. The appellant then obtained an *ex parte* injunction to restrain the respondent from proceeding with the presentation of a winding-up petition against the appellant. However, on *inter partes* hearing of the injunction application, the learned judge dismissed the appellant's application and discharged the earlier *ex parte* order. Hence this appeal by the appellant. The appellant claimed, *inter alia*, that: (i) the respondent had not obtained any judgment against the appellant personally (as the insurer), but was against the insured person (M Sekar); (ii) the respondent needed to file recovery proceedings under s. 96(1) of the Road Transport Act 1987 ('RTA87') ('s. 96(1)') before taking any step to wind-up the appellant company; (iii) there was an abuse of the court's proceedings when the s. 218 notice was used by the respondent as a tool to oppress the appellant; (iv) the appellant at the material time was a solvent company; and (v) if the injunction was not granted, the appellant would suffer irreparable damages which could not be compensated in damages.

Held (dismissing the appeal with costs)
Per Ramly Ali JCA delivering the judgment of the court:

(1) Section 96(1) imposes upon the insurer the obligation of paying to the person who had obtained a judgment against the insured, after a certificate of insurance had been duly delivered to the person by whom the policy is affected in respect of any third party risk covered under the policy. Thus, the appellant was obliged statutorily to pay the respondent who had obtained the said judgment. The insurer would only be able to avoid the payment obligation under the circumstances and conditions mentioned in s. 96(2) & (3) RTA87. None of the said exceptions applied to allow the appellant to avoid its statutory obligations on the policy. Therefore, the judgment debt of the insured became judgment debt of the appellant (insurer) by virtue of s. 96(1). (para 16)

A **(2)** Under s. 218(1)(e) of the CA65, a company may be wound up if it is unable to pay its debts. The said judgment being a monetary judgment, constituted a debt under s. 96(1). The respondent could recover the said sum from the appellant by serving a statutory demand under s. 218(2)(a) of the CA65. (para 19)

(3) Nowhere does s. 96(1) say that the respondent must first obtain another judgment against the appellant before she could proceed to enforce the said judgment against the insured. Therefore, the question of the respondent having to file recovery proceedings under s. 96(1) against the appellant did not arise at all. The respondent, who had obtained a monetary judgment against the insured which had not been stayed, had the right under s. 96(1) to enforce the said judgment against the insurer without having to first file recovery proceedings against the insurer. (para 21)

(4) The filing of an appeal does not revert the status of the judgment debt to its original status as a disputed debt before judgment was obtained. The filing of an appeal does not make a valid and enforceable judgment a disputed debt. Therefore, the respondent had the right to proceed to issue a statutory notice under s. 218(2)(a) of the CA65. (paras 22 & 23)

(5) An application for an injunction to restrain an intended winding-up petition against a company is known as a "Fortuna Injunction". An injunction of that nature may be granted by court where the presentation of the petition might produce irreparable damage to the company and where the proposed petition has no chance of success. This principle was not applicable to the present case. The respondent had obtained a valid and enforceable judgment against the insured as well as the insurer (appellant). The intended petition if filed was not bound to fail. He had a good chance to succeed. Therefore whether or not it caused irreparable damage is of no consequence. Thus the injunction applied for by the appellant could not be granted. (para 25)

(6) Order 45 r. 1 of the Rules of the High Court 1980 does not take away the right of the respondent as judgment creditor to enforce the judgment by way of a winding-up petition under the CA65 and the relevant winding-up rules, against the appellant.

The respondent is at liberty to exercise her choice in enforcing the judgment debt against the appellant. Such an exercise of her choice does not amount to an abuse of process. (para 31)

(7) Failure on the part of a debtor to pay the particular debt claimed in the 218 notice within the stipulated three weeks period, would give rise to a statutory presumption that the company was insolvent or unable to pay all its existing debts owed to all creditors. The presumption was rebuttable and the onus shifted to debtor company to show that it was able to pay all its debts at the material time. Such rebuttal may be done at the hearing of the petition, after being filed by the creditor. To pay the particular amount or debt claimed under the 218 notice after the expiry of the stipulated three weeks period (as being done by the appellant in the present case) was insufficient to rebut the said presumption. Thus, the presumption remained and the winding-up court was empowered to wind-up the company. (paras 35 & 36)

Bahasa Malaysia *Translation Of Headnotes*

Perayu ('syarikat insurans'/'penanggung insurans') adalah penanggung insurans motosikal KN 6162 yang dinaiki M Sekar ('pembeli insurans') yang terlibat dengan satu kemalangan jalanraya dengan responden. Responden memfailkan tindakan terhadap M Sekar dan memperolehi penghakiman pada 16 Disember 2009 di mana mahkamah memerintahkan M Sekar membayar kepada responden gantirugi RM89,374.03 ('penghakiman tersebut'). Perayu memperolehi kebenaran untuk merayu kepada Mahkamah Rayuan terhadap penghakiman tersebut. Permohonan perayu untuk penangguhan pelaksanaan telah ditolak oleh Mahkamah Tinggi dan permohonan perayu untuk penangguhan pelaksanaan di Mahkamah Rayuan masih tergantung. Perayu tidak membuat bayaran kepada responden mengikut penghakiman tersebut. Peguam-peguam responden telah menyerahkan notis di bawah s. 218(1)(e) Akta Syarikat 1965 ('AS65') ke atas perayu ('notis s. 218') pada 25 Mac 2010. Perayu kemudiannya memperolehi injunksi secara *ex parte* bagi melarang responden dari meneruskan prosiding penyerahan petisyen penggulungan terhadap perayu. Walaubagaimanapun, semasa perbicaraan antara pihak mengenai permohonan injunksi, yang arif hakim telah menolak permohonan pemohon dan melepaskan perintah *ex parte* sebelum ini. Oleh itu rayuan ini oleh perayu. Perayu mendakwa, antara lain, bahawa: (i) responden tidak memperolehi apa-apa penghakiman terhadap perayu secara peribadi

(sebagai penanggung insurans), tetapi terhadap pembeli insurans (M Sekar); (ii) responden perlu memfailkan prosiding untuk mendapat kembali hutang di bawah s.96(1) Akta Pengangkutan Jalan 1987 ('APJ87') ('s. 96(1)') sebelum mengambil apa-apa langkah untuk menggulungkan syarikat perayu; (iii) terdapat salahguna prosiding mahkamah apabila notis s. 218 diguna oleh responden sebagai alat untuk menindas perayu; (iv) perayu pada masa material itu adalah sebuah syarikat solven; dan (v) jika injunksi tidak dibenarkan, perayu akan mengalami kerosakan-kerosakan yang tidak boleh dipulihkan dan yang tidak boleh dipampasi dengan gantirugi.

Diputuskan (menolak rayuan dengan kos)
Oleh Ramly Ali HMR menyampaikan penghakiman mahkamah:

(1) Seksyen 96(1) mengenakan ke atas penanggung insurans kewajipan membayar kepada orang yang telah memperolehi penghakiman terhadap pembeli insurans, selepas sijil insurans disampaikan kepada orang yang berkenaan dalam penghormatan mana-mana risiko pihak ketiga yang dilindungi di bawah polisi. Oleh itu, perayu adalah diwajibkan secara statutori untuk membayar responden yang telah memperolehi penghakiman tersebut. Penanggung insurans hanya boleh elak kewajipan membayar di dalam keadaan dan syarat-syarat yang disebut di dalam s. 96(2) & (3) APJ87. Tiada kata pengecualian-pengecualian boleh digunapakai untuk membenarkan perayu mengelak kewajipan statutorinya ke atas polisi. Oleh itu, hutang penghakiman pembeli insurans menjadi hutang penghakiman perayu (penanggung insurans) mengambilkira s. 96(1).

(2) Di bawah s. 218(1)(e) AS65, sebuah syarikat boleh digulung jika ia tidak mampu membayar hutangnya. Penghakiman tersebut sebagai penghakiman kewangan, merupakan hutang di bawah s. 96(1). Responden boleh mendapatkan jumlah tersebut daripada perayu dengan menyerahkan tuntutan statutori di bawah s. 218(2)(a) AS65.

(3) Tidak terdapat dalam s. 96(1) bahawa responden mesti memperolehi penghakiman lain dahulu terhadap perayu sebelum boleh meneruskan penguatkuasaan penghakiman tersebut terhadap pembeli insurans. Oleh itu, persoalan bahawa responden mesti memfailkan prosiding untuk mendapatkan balik hutang di bawah s. 96(1) terhadap perayu tidak timbul langsung. Responden, yang telah memperolehi penghakiman kewangan terhadap pembeli insurans yang tidak pernah bergantung, mempunyai hak di bawah s. 96(1) untuk

melaksanakan penghakiman tersebut terhadap penanggung insurans tanpa diperlukan memfailkan dahulu prosiding untuk mendapat balik hutang terhadap penanggung insurans.

(4) Pemfailan rayuan tidak mengembalikan status hutang penghakiman kepada status asalnya sebagai hutang yang dipertikaikan sebelum penghakiman diperolehi. Pemfailan rayuan tidak membuatkan penghakiman yang sah dan boleh dilaksanakan sebagai hutang yang dipertikaikan. Oleh itu, responden mempunyai hak untuk terus mengeluarkan notis statutori di bawah s. 218(2)(a) AS65.

(5) Permohonan injunksi untuk melarang petisyen penggulungan terhadap sebuah syarikat dikenali sebagai 'Injunksi Fortuna'. Injunksi yang sifat sebegitu boleh dibenarkan oleh mahkamah di mana penyampaian petisyen mungkin akan menyebabkan kerosakan yang tidak boleh dipulih kepada syarikat dan di mana petisyen yang dicadangkan itu tidak mempunyai peluang kejayaan. Prinsip ini tidak boleh digunapakai kepada kes ini. Responden telah memperolehi penghakiman yang sah dan boleh dilaksanakan terhadap pembeli insurans dan juga terhadap penanggung insurans (perayu). Petisyen yang diniatkan itu jika difailkan tidak semestinya terikat untuk gagal. Beliau mempunyai peluang untuk berjaya. Oleh itu sama ada ia akan menyebabkan kerosakan yang tidak boleh dipulih tidak mempunyai apa-apa kesan. Dengan itu injunksi yang dipohon oleh perayu tidak boleh dibenarkan.

(6) Aturan 45 k.1 Kaedah-kaedah Mahkamah Tinggi 1980 tidak mengambil hak responden sebagai pemiutang penghakiman untuk melaksanakan penghakiman melalui petisyen penggulungan di bawah CA65 dan kaedah-kaedah penggulungan yang relevan, terhadap perayu. Responden berhak melaksanakan cara pilihannya untuk perlaksanaan hutang penghakiman terhadap perayu. Perlaksanaan seperti itu bukanlah satu penyalahgunaan proses.

(7) Kegagalan penghutang untuk membayar hutang yang dituntut di dalam notis s. 218 dalam masa tempoh tiga minggu yang ditetapkan, akan menimbulkan anggapan statutori bahawa syarikat adalah tak solven atau tidak mampu membayar hutang-hutang sedia ada kepada pemiutang-pemiutang. Anggapan boleh dipatahkan dan bebanan beralih kepada syarikat penghutang untuk menunjukkan bahawa ia mampu membayar semua hutang-hutangnya pada masa yang material itu. Pematahan

A seperti itu boleh dilakukan di perbicaraan petisyen, selepas difailkan oleh pemiutang. Untuk membayar jumlah tertentu atau hutang yang dituntut di bawah notis s. 218 selepas tamat tempoh tiga minggu yang ditetapkan (seperti yang dilakukan oleh perayu di dalam kes ini) tidak memadai untuk mematahkan B anggapan. Oleh itu, anggapan kekal dan mahkamah penggulungan diberi kuasa untuk menggulungkan syarikat.

Case(s) referred to:

Bryanston Finance Ltd v. De Vries (No 2) [1976] 2 WLR 41 ***(refd)***

C *Charles Forte Investment Ltd v. Amanda [1964] 1 Ch 240* ***(refd)***

Cornhill Insurance Ple v. Improvement Services Ltd & Ors [1986] WLR 114 ***(refd)***

Europlus Corp Sdn Bhd v. Lim Wai Leong [2003] 42 MLJ 1 ***(refd)***

Fortuna Holdings Pty Ltd v. The Deputy Commissioner of Taxation [1978] VR 83 ***(refd)***

D *Hotel Royal Ltd Bhd v. Tina Travel & Agencies Sdn Bhd [1989] 1 LNS 170 HC* ***(refd)***

In re a Company [1950] 94 SJ 369 ***(refd)***

Mann v. Goldstein [1968] 1 WLR 1091 ***(refd)***

Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd [2002] 3 CLJ 380 CA ***(refd)***

E *Mobikom Sdn Bhd v. Inmiss Communications Sdn Bhd [2007] 3 CLJ 295 CA* ***(refd)***

Morgan Guaranty Trust Co New York v. Lian Seng Properties Sdn Bhd [1991] 1 CLJ 260; [1991] 1 CLJ (Rep) 317 SC ***(refd)***

R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ F *147 FC* ***(refd)***

Re a Company [1894] 1 Ch 349 ***(refd)***

Re Lympne Investments Ltd [1972] 1 All ER 385 ***(refd)***

SBSK Plantations Sdn Bhd v. Dynasty Rangers (M) Sdn Bhd [2002] 2 CLJ 329 HC ***(refd)***

G **Legislation referred to:**

Companies Act 1965, ss. 217(1)(h), 218(1)(e), (2)(a)

Road Transport Act 1987, s. 96(1), (2), (3)

Rules of the High Court 1980, O. 45 r. 1

H **Other source(s) referred to:**

McPherson J, *The Law of Company Liquidation*, 3rd edn, p 54

For the appellant - Melvin Setnam; M/s Jagjit Singh & Co

For the respondent - Brijnandan Singh Bhar; M/s Brijnandan Singh Bhar & Co

I *[Appeal from High Court, Kuala Lumpur; Originating Summons No: D24-NCC 107-2010]*

Reported by Amutha Suppayah

JUDGMENT

Ramly Ali JCA:

Introduction

[1] The present appeal is against the decision of the learned High Court judge made on 27 May 2010, whereby the appellant's application for injunctive relief to restrain the respondent from filing a winding-up petition against it was dismissed with costs and at the same time, the *ex parte* injunction order earlier granted by the court on 20 April 2010 was discharged.

Factual Background

[2] The appellant, being an insurance company, was at all material times the insurer of the motorcycle KN 6162 ridden by one M Sekar a/l Marimuthu which was involved in a road accident with the respondent, a pedal cyclist, on 11 May 1997.

[3] The respondent filed an action to recover damages against the said M Sekar a/l Marimuthu at the Sessions Court. Nevertheless, the Sessions Court dismissed the respondent's action with costs.

[4] The respondent appealed to the High Court against the said dismissal. The High Court had on 16 December 2009 allowed the respondent's appeal where it was held that the said M Sekar a/l Marimuthu was 100% liable for the accident. The High Court ordered the said M Sekar a/l Marimuthu to pay the respondent RM89,374.03 (for general and special damages).

[5] Being dissatisfied with the High Court's decision, the appellant then filed an application for leave to appeal to the Court of Appeal and such application was allowed by the Court of Appeal on 19 February 2010. The appellant then proceeded to file the notice of appeal on 1 April 2010.

[6] In the meantime, the appellant applied for a stay of execution at the High Court. The application was dismissed. The appellant then filed the same application for stay of execution at the Court of Appeal, and the said application is still pending.

[7] The appellant, as insurer of the said motorcycle, did not make payment to the respondent on the said judgment. The respondent then through her solicitors issued and served a notice under s. 218(2)(e) of the Companies Act 1965 to the appellant (the 218 notice) on 25 March 2010.

[8] On 12 April 2010, the appellant applied for an *ex parte* injunction to restrain the respondent from proceeding with the presentation of a winding-up petition against the appellant in respect of the judgment sum claimed in the said 218 notice. The same was allowed by the High Court on 20 April 2010. At the same time, the appellant was ordered to pay the judgment sum into court. The same has been complied with by the appellant.

[9] On 27 May 2010, on *inter partes* hearing of the injunction application, the learned judge dismissed the appellant's application and at the same time discharged the earlier *ex parte* order dated 20 April 2010.

[10] The appellant, being dissatisfied with the said decision now appeals to this court.

Appellant's Contentions

[11] In the present appeal, the appellant raised *inter alia* the following contentions:

(a) the respondent had not obtained any judgment against the appellant personally (as the insurer), but was against the insured person (M Sekar a/l Marimuthu);

(b) the respondent needs to file a recovery proceedings under s. 96(1) of the Road Transport Act 1987 before taking any step to wind up the appellant company;

(c) there was an abuse of the court's proceedings when the statutory notice under s. 218 of the Companies Act 1965 was used by the respondent as a tool to oppress the appellant;

(d) the appellant at the material time was a solvent company whose total assets were in excess of RM600 million with total liabilities of slightly more than RM168 million; and the full judgment sum which is the subject matter of the 218 notice is only RM89,374.03;

(e) the injunction is needed to preserve the *status quo* between the parties; if the injunction is not granted, the appellant will suffer irreparable damages which cannot be compensated in damages.

Respondent's Contentions

[12] The respondent on the other hands, contended that she has obtained a valid judgment for the said sum against the insured, M Sekar a/l Marimuthu on 16 December 2009, which by virtue of s. 96(1) of the Road Transport Act 1987 can be enforced against the appellant (as the insurer) since there was no stay of execution granted; and the respondent is not obliged to file any recovery proceedings under the said s. 96(1) before issuing the statutory 218 notice.

[13] The respondent further contended that since the appellant had failed or neglected to pay the judgment sum demanded by the respondent, in the said 218 notice the respondent was at liberty to proceed to file a winding up petition against the appellant.

Findings Of Court

[14] The first issue that needs to be determined is whether the judgment dated 16 December 2009 against the insured (M Sekar a/l Marimuthu) binds and can be enforced against the appellant (as the insurer) under s. 96(1) of the Road Transport Act 1987.

[15] Section 96 relates to the duty of the insurer to satisfy judgment against person insured in respect of third party risks. Section 96(1) reads:

> (1) If, after a certificate of insurance has been delivered under sub-s. (4) of s. 91 of the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under para. (b) of sub-s. (1) of s. 91 (being a liability covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy, the insurer shall, subject to this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgments.

[16] The statutory provisions of s. 96(1) is very clear. It imposes upon the insurer (the appellant, in this appeal) the obligation of paying to the person who had obtained a judgment against the insured, after a certificate of insurance had been duly delivered to

A the person by whom the policy is affected in respect of any third party risk covered under the policy. In short, the appellant in the present appeal is obliged statutorily to pay the respondent who had obtained the judgment dated 16 December 2009 against M. Sekar a/l Marimuthu (the insured) for a sum of RM89,374.03. It is also
B clear under the section that the appellant (insurer) is also obliged to pay the respondent the costs and interest accrued therefrom.

[17] The insurer would only be able to avoid the payment obligation under the circumstances and conditions mentioned in
C subs. 2 and 3 of s. 96, that is to say, where the requisite notice of the proceedings was not given to the insurer before the commencement of the proceedings; where there is a stay of the judgment pending appeal; where the policy of insurance respecting the liability had been cancelled; and where the insurer had obtained
D a declaration from the court that the insurance was void or unenforceable. None of the above-mentioned exceptions apply to allow the appellant (insurer) in the present case to avoid his statutory obligations on the policy.

E **[18]** That being the case, the judgment debt of the insured (M Sekar a/l Marimuthu) becomes judgment debt of the appellant (insurer) by virtue of s. 96(1) of the Road Transport Act 1987.

[19] Under s. 218(1)(e) of the Companies Act 1965, a company may be wound up if it is unable to pay its debts. The New Oxford
F Thesaurus of English defined "debt" as "bill, account, tally, financial obligation, outstanding payments, amount due, money arising, dues, arrears and charges".

[20] Applying the plain meaning of the word, there is no doubt
G that the said judgment obtained by the respondent on 16 December 2009 being a monetary judgment, constitutes a debt ie, amount due from the appellant (insurer) to the respondent under s. 96(1) of the Road Transport Act 1987. The respondent may recover the said sum from the appellant by serving a statutory demand under s.
H 218(2)(a) of the Companies Act 1965.

[21] Nowhere does s. 96(1) of the Road Transport Act 1987 say that the respondent must first obtain another judgment against the appellant before she can proceed to enforce the judgment earlier
I obtained by the respondent against the insured. Therefore, the question of the respondent having to file a recovery proceedings under s. 96(1) against the appellant, as contended by the appellant in its memorandum of appeal, does not arise at all. In short, the

respondent, who had obtained a monetary judgment against the insured which has not been stayed, has the right under s. 96(1) to enforce the said judgment against the insurer without having to first file a recovery proceedings against the insurer.

[22] The status of the judgment on the insurer under s. 96(1) of the Road Transport Act 1987 is the same with status of the said judgment on the insured earlier granted in favour of the respondent. Unless set aside or stayed by proper authority, the said judgment remains. Upon the respondent obtaining the judgment against the insured, the debt ceased to be a disputed debt. Thereafter the question whether the debt or amount due was bona fide disputed became non-issue. This is so even though the appellant had filed an appeal against the said judgment because the filing of an appeal does not have the effect of reverting the status of the judgment debt to its original status as a disputed debt before judgment was obtained. The filing of an appeal does not make a valid and enforceable judgment a disputed debt. (see: *SBSK Plantations Sdn Bhd v. Dynasty Rangers (M) Sdn Bhd* [2002] 2 CLJ 329).

[23] In the instant case, the respondent has the right to proceed to issue a statutory notice under s. 218(2)(a) of the Companies Act 1965. Upon the expiration of the 21 days period as set out in the statutory notice and the amount claimed remaining unpaid, the debt becomes 'due and payable' and the appellant as the insurer is deemed to be unable to pay its debts. Consequently, the respondent acquires the status of 'creditor' for the purpose of winding up proceedings under s. 217(1)(h) and 218(1)(e) of the Companies Act 1965.

[24] The right of the respondent to initiate winding-up proceedings against the appellant in this case, is a substantive right conferred by substantive law ie, s. 96(1) of the Road Transport Act 1987, read together with ss. 217(1)(b); 218(1)(e) and 218(2) of the Companies Act 1965. Neither procedural law nor inherent jurisdiction of the court can deprive the respondent of that right. The proper exercise of that right by the respondent by issuing the 218 notice as in the present case, cannot amount to an abuse of court process. (see: *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147).

[25] An application for an injunction to restrain an intended winding-up petition against a company is known as a "Fortuna Injunction", taking its name from the case of *Fortuna Holdings Pty Ltd v. The Deputy Commissioner of Taxation* [1978] VR 83. In that

A case the court laid down the basis on which a court acts to restrain the presentation of a winding-up petition and the two principles that guide courts in the grant of an injunction to that effect. (see also: *Mobikom Sdn Bhd v. Inmiss Communications Sdn Bhd* [2007] 3 CLJ 295 (Court of Appeals).

B

[26] The first principle laid down in that case in that an injunction of that nature may be granted by court where the presentation of the petition might produce irreparable damage to the company and where the proposed petition has no chance of success. C In order to succeed in getting injunction under this principle, the applicant must satisfy both limbs of the principle *ie*,:

(i) the intended petition has no chance of success, as a matter of law as well as a matter of fact; and

D (ii) the presentation of such petition (which has no chance of success) might produce irreparable damage to the company.

(see: *Re A Company* [1894] 1 Ch 349; *Charles Forte Investment Ltd v. Amanda* [1964] 1 Ch 240, [1963] 2 All ER 940; and *Bryanston* E *Finance Ltd v. De Vries (No 2)* [1976] 2 WLR 41, [1976] 1 All ER 25)

[27] This principle is not applicable to the present case. The respondent herein had obtained a valid and enforceable judgment F against the insured as well as the insurer (appellant). The intended petition if filed is not bound to fail. He has a good chance to succeed. Therefore whether or not it causes irreparable damage is of no consequence. Thus the injunction applied for by the appellant in the present case, cannot be granted by court under this principle.

G **[28]** The second principle established in the *Fortuna* case is that an injunction of that nature may be granted in cases where a petitioner proposing to present a petition has chosen to assert a disputed claim, by a procedure which might produce irreparable damage to the company, rather than by a suitable alternative H procedure.

[29] This principle applies only to disputed debt. It does not apply to cases where the debt in question is undisputed. As long as the debt cannot be disputed, it is not consequence whether or not it I will cause irreparable damage to the company, if presented. A valid and enforceable judgment of court as in the present case, (unless set

aside or stayed) cannot be considered a disputed debt. The law is settled on this point. Therefore, an order for injunction as prayed for by the appellant in the present case, also cannot be granted under this principle.

[30] The learned counsel for the appellant in his oral submissions before this court suggested that the respondent should have used other alternative procedure which would not result in irreparable damage to enforce the judgment debt against the appellant. He suggested procedures listed under O. 45 r. 1 of the Rules of the High Court 1980 which provides that a judgment or order for payment of money, not being a judgment or order for payment of money into court, may be enforced by one or more of the following means, namely:

(a) writ of seizure and sale;

(b) garnishee proceedings;

(c) a charging order;

(d) appointment of a receiver; and

(e) an order for committal.

[31] The court is of the view that the procedures listed under O. 45 r. 1 above are of general application that relate to judgment for payment of money. They are without prejudice to any other remedy or procedure available to enforce such a judgment as provided for under any written law relating to bankruptcy or winding-up of companies; or the Debtors Act 1957. Order 45 r. 1 does not take away the right of the respondent as judgment creditor to enforce the judgment by way of a winding-up petition under the Companies Act 1965 and the relevant winding-up rules, against the appellant, being a company incorporated under the Companies Act 1965. Such right was confirmed by the Court of Appeal in *Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd* [2002] 3 CLJ 380, where it was held *inter alia* that "execution is a natural process after obtaining a judgment and a winding-up is one of them."

[32] That being the case, the respondent is at liberty to exercise her choice in enforcing the judgment debt against the appellant. She may choose to initiate a winding-up proceedings against the appellant by first issuing s. 218 notice, as what she did in the present case. Such an exercise of her choice does not amount to an abuse of process, as alleged by the appellant.

[33] Under s. 218(2)(a) of the Companies Act 1965, if a debtor does not or neglect to pay the debt demanded (which exceeds RM500) or to secure or compound for it to the reasonable satisfaction of the creditor within the stipulated three weeks (21 days) of service of the 218 notice, the company shall be deemed to be unable to pay its debts and the creditor is entitled to present a petition to wind-up the company under s. 218(1)(e) of the same Act. The creditor, cannot be restrained by an injunction from exercising such right.

[34] When the creditor's debt as claimed in the 218 notice is clearly undisputed (as in the present case) and the debtor fails to comply with the order within the stipulated three weeks, the presumption that the company is unable to pay its debts or financially insolvent. The word "debts" (in plural) as appears in s. 218(1)(e) and (2) refers to all the debts owed by the company to all creditors (if any), not only to the specific debt claimed by the creditors in the 218 notice in question.

[35] In short, failure on part of a debtor to pay the particular debt claimed in the 218 notice within the stipulated three weeks period, will give rise to a statutory presumption that the company is insolvent or unable to pay all its existing debts owed to all creditors.

[36] The scope or the meaning to be given to the phrase 'unable to pay its debts' appearing in s. 218(1)(e) of the Companies Act 1965 is explained by McPherson J in his book "*The Law of Company Liquidation* (3rd edn)" at p. 54 as follows:

> The phrase 'unable to pay its debts' is susceptible of two interpretations. One meaning which may properly be attached to it is that a company is unable to pay its debts if it is shown to be financially insolvent in the sense that its liabilities exceed its assets. But to require proof of this in every case would impose upon an applicant the often near-impossible task of establishing the true financial position of the company, and the weight of authority undoubtedly supports the view that the primary meaning to the phrase is insolvency in the commercial sense-that is inability to meet current demands irrespective of whether the company is possessed of assets which, if realized would enable is to discharge its liabilities in full.

[37] The presumption is rebuttable and the onus is shifted to debtor company to show that it is able to pay all its debts at the material time. Such rebuttal may be done at the hearing of the petition, after being filed by the creditor. To pay the particular amount or debt claimed under the 218 notice after the expiry of the stipulated three weeks period (as being done by the appellant in the present case) is obviously insufficient to rebut the said presumption. Under such circumstances, the presumption remains and the winding-up court is empowered to wind-up the company. (see: *Hotel Royal Ltd Bhd v. Tina Travel & Agencies Sdn Bhd* [1989] 1 LNS 170; *Europlus Corp Sdn Bhd v. Lim Wai Leong* [2003] 42 MLJ 1; *Re Lympne Investments Ltd* [1972] 1 All ER 385; *Cornhill Insurance Ple v. Improvement Services Ltd & Ors* [1986] WLR 114; and *Mann v. Goldstein* [1968] 1 WLR 1091).

[38] When the debt is clearly established it follows that the court would not in general at any rate, interfere eventhough the company would appear to be solvent. (see: *Mann v. Goldstein (supra)*. Vaisey J once said in the case of *In re a Company* [1950] 94 SJ 369:

> Rich men and rich companies who did not pay their debts had only themselves to blame if it were thought that they could not pay them.

Conclusion

[39] Based on the above considerations, this court is of the view that the learned High Court judge was correct in exercising his discretion in refusing injunction as prayed for by the appellant. There is no reason for interference by this court. This is not an application for interlocutory injunction to restrain a defendant from doing acts alleged to be a violation of the plaintiff's legal right, but to restraint a defendant from exercising his legal right to present a petition to wind-up a company. (see: *Charles Forte Investment Ltd v. Ananda (supra)*).

[40] *Prima facie*, a creditor who is not paid has a right to file a petition for a winding-up whatever may be his other motives. (see: *Morgan Guaranty Trust Co New York v. Lian Seng Properties Sdn Bhd* [1991] 1 CLJ 260; [1991] 1 CLJ (Rep) 317).

[41] The appellant fears of irreparable damage if the injunction prayed for is not granted. On this issue, the judgment of the Court of Appeal in *Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd (supra)* serves a strong reminder where it was held as follows:

A On the facts, the grounds relied on by the applicant are nothing more than 'fear of losing'; fear of losing business, fear of losing customers, fear of losing suppliers, fear of losing goodwill, fear of not being able to collect its dents from third parties, in case the applicant company is wound up. All that the applicant has to do to avoid such 'fears' is to settle the judgment debt. These factors are not 'special circumstances' or do they show that the appeal, if successful, will be rendered nugatory. They are nothing unusual. Execution is a natural process after obtaining a judgment and winding-up is one of them.

C **[42]** Therefore, the appeal is dismissed with costs of RM5,000 to the respondent. Deposit to the respondent to account of cost.

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